No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CPC INTERNATIONAL INC. IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

DENIS MCINERNEY
80 Pine Street
New York, N. Y. 10005
Counsel for Amicus Curiae CPC International Inc.

Of Counsel:

WILLIAM T. LIFLAND
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL

CLIFFORD B. STORMS
WILLIAM S. WELLS
CPC International Inc.

TABLE OF CONTENTS

PAGE

Interest of the *Amicus Curiae* 1

Argument 3

I. Contribution in Antitrust Cases Would Avoid the Arbitrary Allocation of Treble-Damage Liability and Is Consistent With Congressional Purpose 3

II. Contribution in Antitrust Cases Would Prevent Abuse of the Settlement Process 8

Conclusion 11

Table of Authorities

Cases:

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974) 4

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 8-9

In re Corrugated Container Antitrust Litigation, 84 F.R.D. 40 (S.D. Tex. 1979) 9

Hawaii v. *Standard Oil Co.*, 405 U.S. 251 (1972) 3

United States v. *Reliable Transfer Co.*, 421 U.S. 397 (1975) 6

United States v. *United Gypsum Co.*, 438 U.S. 422 (1978) 6

PAGE

Other Authorities:

Brief for *Amicus Curiae* Mead Corp., *Westvaco Corp.* v. *Adams Extract Co.*, 49 U.S.L.W. 3288 (U.S. Oct. 20, 1980) (No. 79-972) 9n

Furth & Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk with Plaintiff's Trial Counsel*, 23 De Paul L. Rev. 865 (1974) 10n

Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890 (1980) 9

Remarks of Rep. Rodino, 120 Cong. Rec. 36388 (1974) .. 5

S. Rep. No. 428, 96th Cong., 1st Sess. (1979) 9

Wall Street Journal

Nov. 11, 1975, p. 4. col. 2 ..... 8n
July 31, 1978, p. 4, col. 2 ..... 8n
Nov. 14, 1978, p. 14, col. 3 ..... 8n
Nov. 24, 1978, p. 8, col. 4 ..... 8n
Apr. 10, 1979, p. 18, col. 2 ..... 8n
May 1, 1979, p. 4, col. 2 ..... 8n
May 2, 1979, p. 21, col. 1 ..... 8n
May 21, 1979, p. 37, col. 4 ..... 8n
July 24, 1979, p. 33, col. 3 ..... 8n
Sept. 14, 1979, p. 21, col. 1 ..... 8n
Sept. 20, 1979, p. 32, col. 3 ..... 8n
Aug. 18, 1980, p. 6, col. 4 ..... 8n
Sept. 19, 1980, p. 34, col. 1 ..... 8n
Sept. 29, 1980, p. 50, col. 4 ..... 8n

No. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner,

v.

RADCLIFF MATERIALS, INC., JIMCO, INC. and OKC DREDGING, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CPC INTERNATIONAL INC. IN SUPPORT OF PETITIONER TEXAS INDUSTRIES, INC.

On consent of all parties, CPC International Inc. ("CPC") submits this brief as *amicus curiae* in support of Petitioner's position that a right of contribution does or should exist among co-defendants in Federal antitrust cases.

Interest of *Amicus Curiae*

CPC manufactures and sells a wide variety of products, including a number derived from corn. It is a defendant, along with others, in over 30 antitrust "class" actions charging collusive pricing among manufacturers of corn derivatives. These actions have been consolidated for pre-trial purposes as *In re Corn Derivatives Antitrust Litigation,* MDL Docket No. 414, D.N.J. Misc. No. 80-59.

In the past, CPC also refined sugar, and was a defendant with others in antitrust class actions charging collusive pricing among Eastern sugar refiners. CPC settled the claims made against it in the sugar class actions by payment of approximately $9 million into a settlement fund totaling $25,323,000. As has been the fate of many another defendant in an industry-wide class action, CPC agreed to pay such a substantial amount in settlement because the enormity of the contingent liability at issue—there estimated at $900 million—made it imprudent to risk trial on the strength of CPC's judgment that the evidence did not warrant a verdict against it. This overwhelming pressure to settle was attributable not only to the statutory trebling of actual damages and the class action device; it was also attributable in large part to the uncertainty of legal procedures for equitably allocating damages among antitrust defendants.

Absent such allocation, plaintiffs in industry-wide cases are free to make early "sweetheart" settlements with defendants of their choice, thus raising a "war chest" which assures the payment of legal fees regardless of the outcome, and leaving the remaining defendants with *increased* damage exposure based on the sales of the entire industry. The amount at risk for these defendants is then out of proportion to their own sales. To illustrate, CPC's share of Eastern sugar industry sales was only 7%, but its share of settlement payments was roughly 28%.

CPC's experience is not unusual. More often than not, one or more defendants in industry-wide suits are forced to choose between disproportionate damage exposure and a disproportionate settlement. For the reasons stated below, CPC believes that recognizing the right to contribution would help bring about greater fairness in both adjudicated and settled antitrust litigation.

ARGUMENT

I.

Contribution in Antitrust Cases Would Avoid the Arbitrary Allocation of Treble-Damage Liability and Is Consistent With Congressional Purpose.

In establishing "private attorneys general" to enforce the antitrust law, *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 (1972), Congress necessarily provided them with "prosecutorial discretion" to pursue certain defendants more vigorously than others in their own private interests. Quite naturally, they cannot be relied upon for even-handed enforcement. For example, in a multi-party conspiracy case, a plaintiff will often fund his case with an early settlement (perhaps even before the case is filed) with some of the alleged conspirators; then, as to the remainder, he may either

(a) obtain a judgment against all of them, but enforce it only against one (*e.g.*, for competitive reasons, or because it is easier to collect from one), or

(b) seek judgment against some but not others in return for favorable testimony or some other consideration.

These alternatives do not leave defendants fairly situated with respect to each other.

Assuming that all alleged co-conspirators are equally at fault, it is obviously unfair for some of them to leave the litigation relatively unscathed while others (perhaps only one other) must pay for those defendants' unlawful conduct. In practice, however, the prospect of achieving such an escape at the expense of a competitor (a commonplace

in cases alleging price-fixing) often tempts one or more defendants to enter deals with the plaintiff to the detriment of the other defendants.

On the assumption that some defendants are more culpable than others, a system which permits the more culpable defendants to shift their liability to those less culpable is even more unfair.

When a defendant has been subjected to a judgment for which another is equally liable, this Court has recognized that the common law's tendency to "leave the wrongdoer where it finds him" is not an adequate solution. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court stated:

> "[A] 'more equal distribution of justice' can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris*, [137 U.S. 1 (1890)], at 14." 417 U.S. at 111.

A "more equal distribution of justice" would not be contrary to Congressional purpose in enacting the antitrust laws. The arguments used against contribution are theoretical at best, and lack empirical support. They generally fall under the headings of increasing deterrence and encouraging settlements.

(a) *Deterrence.* No persuasive reason was given by the Court of Appeals for its view that the prospect of being saddled with an unfairly disproportionate treble-damage judgment would have any additional deterrent effect on would-be violators beyond that which already exists. Indeed, it is most unlikely that it would. The criminal pro-

visions of the antitrust laws serve as powerful deterrents to knowing violation, particularly since the 1974 amendments, which tripled the maximum prison terms and further multiplied the fines that may be imposed (*see* 120 Cong. Rec. 36338-39 (1974), remarks of Rep. Rodino). Treble-damage exposure, and the prospect of class actions, probably also deter violations. No additional deterrence is needed or can be expected from a rule permitting plaintiffs to manipulate the impact of trebled damages so that it falls more heavily on defendants of their choice.

To put the matter concretely: many corporations (including CPC) follow a program of educating employees about the antitrust laws. Employees are told of the criminal penalties applicable to them individually, the danger of substantial monetary loss to the corporation from both government and private suits, and the risk of jeopardizing their employment if they take action causing the corporation to be subjected to such a loss. If, despite such warnings, an executive is prepared to knowingly violate the law, risking personal fines, imprisonment, and loss of future employment, it defies reason to suppose that he would be deterred from the violation if his employer's possible loss included disproportionate as well as treble damages.

Moreover, even if the possibility of disproportionate liability would deter violations, a contribution rule could permit disproportionate liability where the circumstances warrant (*e.g.*, on the organizer and ringleader of a conspiracy). In such a case, however, the disproportionate result would have been imposed judiciously by a court instead of accidentally or as the result of the animosity of some of the parties working against the others. Putting that power to impose sanctions in judicial hands is especially appropriate because of the dangers of over-deterrence recently noted by this Court:

> "salutary and pro-competitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment for even a good-faith error of judgment." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 441 (1978) (footnote omitted).

(b) *Settlement.* While it is argued that contribution might impede settlement, it would seem more likely to stimulate fairer settlements. The issues on this point are similar to those posed in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), where the Court ruled that damages in admiralty cases are to be equitably apportioned. With respect to the argument that the old rule enabled quick settlements, the Court stated:

> "at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out of court accommodations."
>
> "Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." 421 U.S. at 408 (footnote omitted).

Further, a contribution rule in antitrust cases would not prevent an early settlement by a fringe defendant for a small sum. He could do this without further involvement if the plaintiff would agree to either (a) "take his sales out of the case" by not seeking to collect on them from the

other defendants, or (b) hold him harmless against a further assessment—a common arrangement in federal securities law cases, where the right of contribution has been recognized. Alternatively, the settling defendant might bargain with the other defendants to obtain a waiver of their right of contribution or, if the court were willing, secure an advance ruling that his payment would discharge his burden. At worst, the remaining defendants could later proceed against the fringe defendant for any excess required to make up his equitable contribution to the total cost of disposition. This works no unfairness on the fringe defendant; it merely assures that he will bear his fair share of the load.[1]

Admittedly, however, clarifying the right to contribution would affect the settlement of antitrust cases. The manner in which it would do so is indicated below.

[1] The enormous expenses generated by protracted antitrust litigation may provide the fringe defendant with sufficient incentive to settle early, regardless of the possibility of additional contribution at some point in the future.

II.

Contribution in Antitrust Cases Would Prevent Abuse of the Settlement Process.

It is a matter for judicial notice that the settlement of multiple-defendant industry-wide class action cases is a multi-million dollar and growing enterprise. A sampling of recent settlements as reported in the *Wall Street Journal*[2] is set out below:

Industry	Amount	Year
Sugar Refining, Eastern and Western	$42,900,000	1975-1979
Cardboard Box	298,100,000	1979
Folding Cartons	210,000,000	1979
Water Heaters	13,650,000	1979
Cement	22,150,000	1980
Fine Papers	51,000,000	1980

When such large amounts of money are at stake, class action plaintiffs are well aware that defendants are under considerable pressure to settle rather than risk trial. As the Court observed in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978),

---

[2] Nov. 11, 1975, p. 4, col. 2; July 31, 1978, p. 4, col. 2; Nov. 14, 1978, p. 14, col. 3; Nov. 24, 1978, p. 8, col. 4; Apr. 10, 1979, p. 18, col. 2; May 1, 1979, p. 4, col. 2 (sugar industry articles). May 2, 1979, p. 21, col. 1 (cardboard box industry). Sept. 14, 1979, p. 21, col. 1 (folding carton industry). May 21, 1979, p. 37, col. 4; July 24, 1979, p. 33, col. 3; Sept. 20, 1979, p. 32, col. 3 (water heater industry). Aug. 18, 1980, p. 6, col. 4; Sept. 19, 1980, p. 34, col. 1 (cement industry). Sept. 29, 1980, p. 50, col. 4 (fine paper industry). The amounts reported, in the one industry in which CPC was involved, understate those actually paid.

> "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." 437 U.S. at 476.

In these circumstances, the absence of a contribution rule makes it possible for class action plaintiffs to exact increasing settlement premiums from the last defendants to settle, whether because plaintiffs "targeted" them for such exactions from the beginning, or because they felt they could not make a reasonable assessment of the merits of plaintiffs' claims at the earlier stage.

Early partial settlements may be in any amount which the court may consider as fair to the class, and in practice they receive little scrutiny. It has become common procedure for class action plaintiffs to obtain financing by partial settlements and progressively raise the amount for later settlements to reflect the enhanced exposure of each remaining defendant as settlements occur. Plaintiffs are thus in a position to impose arbitrary and increasingly unfair penalties on the remaining defendants.[3] This "whipsawing" has been criticized by a Congressional committee as "unfair", S. Rep. No. 428, 96th Cong., 1st Sess. 14-15 (1979), by a district court as "inherently coercive", *In re Corrugated Container Antitrust Litigation*, 84 F.R.D. 40, 41 (S.D. Tex. 1979), and by a law review commentator as producing "inequitable results", Note, *Contribution and Antitrust Policy*, 78 Mich. L. Rev. 890, 908 (1980).

---

[3] A detailed statement of the method used in one such case is contained in the *amicus curiae* brief of Mead Corporation in No. 79-972. Settlements were negotiated on the basis of each defendant's percentage ("points") of total market share. The tabulation at page 10 of that brief indicates that one defendant paid *6.5 times* as much per point than a larger competitor which settled

Recognition of a right of contribution would act to prevent these presently-common abuses of the settlement process in several ways. Most importantly: It would permit innocent defendants to seek judicial vindication in cases in which they are now unwilling to take the risks of a ruinous verdict without any real possibility of contribution. In other words, contribution would provide an alternative to coerced capitulation in class action antitrust cases, similar to the alternative the law makes available in ordinary liti-

---

a few months earlier—even though the premium-paying defendant was acquitted at the criminal trial.

Another illustration of this tactic can be found in an article reviewing the wallboard antitrust cases, co-authored by one of the attorneys on the plaintiffs' side. Furth and Burns, *The Anatomy of a Seventy Million Dollar Sherman Act Settlement—A Law Professor's Tape-Talk with Plaintiff's Trial Counsel,* 23 De Paul L. Rev. 865, 890 app. (1974). According to Furth and Burns at 890, among the three principles "foremost in the formulation of a settlement policy by liaison and class counsel" were "the notion that earlier defendants to settle would be given the opportunity to settle at a lower percentage of sales" and "the likelihood that settlement with one defendant would have a snowballing effect among others. . . ."

On June 29, 1973 one defendant accepted a settlement figure of $2,000,000 or approximately 7.5 per cent of its nationwide wallboard sales for 1966 and 1967. Prior to consummating this settlement, "plaintiffs advised all defendants that the price of settlement (as a percentage of sales) would increase with each successive settling defendant." Immediately after the first agreement, a second defendant agreed to settle at a figure of approximately 10 percent of its sales. Within a week, two more defendants surrendered at roughly sixteen percent of sales. One week and two settlements had multiplied the price of settlement. As Professor Burns put it:

> "Accordingly, plaintiffs' settlement strategy had produced a settlement fund of $22.5 million from four of the seven defendants. *These settlements placed enormous pressure on the two remaining major defendants.* . . ." Furth and Burns, supra, 23 De Paul L. Rev. at 890 app. (emphasis added).

Thus, by early August the two remaining major defendants were coerced into adding a combined figure of $45 million, thereby tripling the settlement pot.

gation. Because of the existence of this alternative, plaintiffs would not be in a position to extort discriminatory amounts from defendants by the machinations described above. Finally, recognition that disproportionate treatment might give rise to contribution proceedings among defendants would influence all parties to negotiate settlements of all claims at once—on terms likely to be approved by the Court as fair to both plaintiffs and defendants.

CONCLUSION

For the foregoing reasons, CPC International Inc. respectfully requests this Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to remand to the district court with instructions to permit the assertion of claims to contribution.

Respectfully submitted,

DENIS MCINERNEY
80 Pine Street
New York, N. Y. 10005
Counsel for Amicus Curiae
CPC International Inc.

Of Counsel:

WILLIAM T. LIFLAND
ALLEN S. JOSLYN
CAHILL GORDON & REINDEL

CLIFFORD B. STORMS
WILLIAM S. WELLS
CPC International Inc.

December 18, 1980